Nr 27 Caroline von Hannover vs. Duitsland

EHRM 24 juni 2004
Application no. 59320/00

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

The Court (Third Section), sitting as a Chamber composed of:

Mr I. Cabral Barreto, President,
Mr G. Ress,
Mr L. Caflisch
Mr R. Türmen
Mr B. Zupancic,
Mr J. Hedigan,
Mr K. Traja, judges,
and Mr V. Berger, Section Registrar,

Having deliberated in private on 6 November 2003 and on 3 June 2004,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who is the eldest daugher of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time. As a member of Prince Rainier's family, the applicant is the president of certain humanitarian or cultural foundations, such as the "Princess Grace" foundation or the "Prince Pierre de Monaco" foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or one of its institutions.

A. Background to the case

9. Since the early 1990s the applicant has been trying – often through the courts – in a number of European countries to prevent the publication of photos about her private life in the tabloid press.

10. The photos that were the subject of the proceedings described below were published by the publishing company Burda in the German magazines *Bunte* and *Freizeit Revue* and by the publishing company Heinrich Bauer in the German magazine *Neue Post*.

1. The first series of photos

(a) The five photos of the applicant published in Freizeit Revue magazine (edition no. 30 of 22 July 1993)

11. These photos show her with the actor Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. The first page of the magazine refers to "the tenderest photos of her romance with Vincent" ("*Die zärtlichsten Fotos Ihrer Romanze mit Vincent*") and the photos themselves bear the caption "these photos are evidence of the tenderest romance of our time" ("*Diese Fotos sind der Beweis für die zärtlichste Romanze unserer Zeit*").

(b) The two photos of the applicant published in Bunte magazine (edition no. 32 of 5 August 1993)

12. The first photo shows her on horseback with the caption "Caroline and the blues. Her life is a novel with innumerable misfortunes, says the author Roig" ("*Caroline und die Melancholie. Ihr Leben ist ein Roman mit unzähligen Unglücken, sagt Autor Roig*"). The second photo shows her with her children Peter and Andrea. The photos are part of an article entitled "I don't think I could be a man's ideal wife" ("*Ich glaube nicht, dass ich die ideale Frau für einen Mann sein kann*").

(c) The seven photos of the applicant published in Bunte magazine (edition no. 34 of 19 August 1993)

13. The first photo shows her canoeing with her daughter Charlotte, the second shows her son Andrea with a bunch of flowers in his arms. The third photo shows her doing her shopping with a bag slung over her shoulder, the fourth with Vincent Lindon in a restaurant and the fifth alone on a bicycle. The sixth photo shows her with Vincent Lindon and her son Pierre. The seventh photo shows her doing her shopping at the market, accompanied by her bodyguard. The article is entitled "Pure happiness" ("*Vom einfachen Glück*").

2. The second series of photos

(a) The ten photos of the applicant published in Bunte magazine (edition no. 10 of 27 February 1997)

14. These photos show the applicant on a skiing holiday in Zürs/Arlberg. The accompanying article is entitled "Caroline ... a woman returns to life" ("*Caroline...eine Frau kehrt ins Leben zurück*").

(b) The eleven photos of the applicant published in Bunte magazine (edition no. 12 of 13 March 1997)

15. Seven photos show her with Prince Ernst August von Hannover visiting a horse show in Saint-Rémy-de-Provence. The accompanying article is entitled "The kiss. Or: they are not hiding anymore" ("*Der Kuss. Oder: jetzt verstecken sie sich nicht mehr*"). Four other photos show her leaving her house in Paris with the caption "Out and about with Princess Caroline in Paris" ("*Mit Prinzessin Caroline unterwegs in Paris*").

(c) The seven photos of the applicant published in Bunte magazine (edition no. 16 of 10 April 1997)

16. These photos show the applicant on the front page with Prince Ernst August von Hannover and on the inside pages of the magazine playing tennis with him or both putting their bicycles down.

3. The third series of photos

17. The sequence of photos published in *Neue Post* magazine (edition no. 35/97) shows the applicant at the Monte Carlo Beach Club, dressed in a swimsuit and wrapped up in a bathing towel, tripping over an obstacle and falling down. The photos, which are quite blurred, are accompanied by an article entitled "Prince Ernst August played fisticuffs and Princess Caroline fell flat on her face" ("*Prinz Ernst August haute auf den Putz und Prinzessin Caroline fiel auf die Nase*").

B. The proceedings in the German courts

The first set of proceedings

[...]

(d) Judgment of the Federal Constitutional Court of 15 December 1999

[...]

25. In a landmark judgment of 15 December 1999, delivered after a hearing, the Constitutional Court allowed the applicant's appeal in part on the ground that the three photos that had appeared in the 32nd and 34th editions of Bunte magazine, dated 5 August 1993 and 19 August 1993, featuring the applicant with her children had infringed her right to the protection of her personality rights guaranteed by sections 2(1) and 1(1) of the Basic Law, reinforced by her right to family protection under section 6 of the Basic Law. It referred the case to the Federal Court of Justice on that point. However, the Constitutional Court dismissed the applicant's appeal regarding the other photos.
The relevant extract of the judgment reads as follows:

"The appeal is well-founded in part.
...
II.
The decisions being appealed do not fully satisfy the requirements of section 2(1) read in conjunction with section 1(1) of the Basic Law.
1. The provisions of sections 22 and 23 of the KUG (Kunsturhebergesetz – Copyright Act) on which the civil courts based their decisions in the present case are, however, compatible with the Basic Law.
Under section 2(1) of the Basic Law general personality rights are guaranteed only within the framework of the constitutional order. The provisions concerning the publication of photographical repre-

sentations of persons listed in sections 22 and 23 of the KUG are part of that constitutional order. They derive from an incident which at the time caused a scandal (photos of Bismarck on his deathbed ...) and from the ensuing politico-legal debate sparked by this incident ..., they aim to strike a fair balance between respect for personality rights and the community's interest in being informed ... .
Under section 22, first sentence, of the KUG pictures can only be disseminated or exposed to the public eye with the express approval of the person represented. Pictures relating to contemporary society are excluded from that rule under section 23(1) of the KUG ... . Under 23(2) of the KUG, however, that exception does not apply where the dissemination interferes with a legitimate interest of the person represented. The protection by degrees under these rules ensures that they take account of both the need to protect the person being represented and the community's desire to be informed and the interest of the media which satisfy that desire. That much has already been established by the Federal Constitutional Court ... .
...
(b) In the instant case regard must be had, in interpreting and applying sections 22 and 23 of the KUG, not only to general personality rights, but also to the freedom of the press guaranteed by section 5(1), second sentence, of the Basic Law in so far as the provisions in question also affect those freedoms.
...
The fact that the press fulfils the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law. The formation of opinions and entertainment are not opposites. Entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information. Moreover, there is a growing tendency in the media to do away with the distinction between information and entertainment both as regards press coverage generally and individual contributions, and to disseminate information in the form of entertainment or mix it with entertainment ("infotainment"). Consequently, many readers obtain information they consider to be important or interesting from entertaining coverage ... .
or can mere entertainment be denied any role in the formation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect it fulfils important social functions ... . When measured against the aim of protecting press freedom, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights ... .
The same is true of information about people. Personalization is an important journalistic means of attracting attention. Very often it is this which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.
As regards politicians this public interest has always been deemed to be legitimate from the point of view of transparency and democratic control. Nor can it in principle be disputed that it exists in respect of other public figures. To that extent it is the function of the press to show people in situations that are not limited to specific functions or events and this also falls within the sphere of protection of press freedom. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest for the public are at issue and treated seriously and objectively or whether private matters, designed merely to satisfy the public's curiosity, are being disseminated ... .
(c) The decision of the Federal Court of Justice largely stands up to an examination of its compatibility with the constitutional rules.

(aa) The Federal Court of Justice cannot be criticised under constitutional law for assessing the conditions of application (Tatbestandsvoraussetzungen) of section 23(1) no. 1 of the KUG according to the criterion of the community's interest in being informed and deciding on that basis that the photos showing the applicant outside her representative function in the Principality of Moncao were lawful.
Under section 23(1) no. 1 of the KUG the publication of pictures portraying an aspect of contemporary society are exempted from the obligation to obtain the consent of the person concerned within the meaning of section 22 of the KUG. Judging from the drafting history to the Act ... and from the meaning and purpose of the words used, the provision in question takes into consideration the community's interest in being informed and the freedom of the press. Accordingly, the interpretation of this element (Tatbestandsmerkmal) must take account of the interests of the public. Pictures of people who are of no significance in contemporary society should not be made freely accessible to the public: they require the prior consent of the person concerned. The other element that is affected by fundamental rights, that of a "legitimate interest" for the purposes of section 23(2) of the KUG, concerns only – and this must be stressed at the outset – figures of contemporary society and cannot therefore take sufficient account of the interests of the freedom of the press if these have previously been neglected when the circle of the persons concerned was defined. It is in keeping with the importance and scope of the freedom of the press, and not unreasonably restrictive of the protection of personality rights, that the concept of contemporary society referred to in section 23(1) no. 1 of the KUG should not only cover, in accordance with a definition given by the courts, events of historical or political significance, but be defined on the basis of the public interest in being informed ... . The kernel of press freedom and the free formation of opinions requires the press to have sufficient margin of manoeuvre to allow it to decide, in accordance with its publishing criteria, what the public interest demands and the process of forming opinion to establish what amounts to a matter of public interest. As has been stated, entertaining coverage is no exception to these principles.
Nor should the Federal Court of Justice be criticised for including in the "domain of contemporary society", within the meaning of section 23(1) no. 1 of the KUG, pictures of people who have not only aroused public interest at a certain point on the occasion of a particular historical event but who, on account of their status and importance, attract the public's attention in general and not just on the odd occasion. Account should also be taken in this regard of the fact that, compared to the situation at the time the Copyright Act was passed, increased importance is given today to illustrated information. The concept of a "figure of contemporary society par excellence" (absolute Person der Zeitgeschichte), often employed in this respect in the case-law and legal theory, does not conclusively derive from statute or the Constitution. If, as was done by the Court of Appeal and the Federal Court of Justice, it is interpreted as a shortened expression designating people whose image is deemed by the public to be worthy of respect out of consideration for the people concerned, it is irreproachable from the point of view of constitutional law at least as long as a balancing exercise is carried out, in the light of the circumstances of the case, between the public's interest in being informed and the legitimate interests of the person concerned.
General personality rights do not require publications that are not subject to prior consent to be limited to pictures of figures of contemporary society in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.
If, on the other hand, the right to publish pictures of people considered to be figures of contemporary society were to be limited to their official functions, insufficient account would be taken of the public interest properly aroused by such figures and this would, moreover, favour a selective presentation that would deprive the public of certain necessary judgmental possibilities in respect of figures of sociopolitical life, having regard to the function of role model of such figures and the influence they exert. The press is not, however, allowed to use any picture of figures of contemporary society. On the contrary, section 23(2) of the KUG gives the courts adequate opportunity to apply the protective provisions of section 2(1) read in conjunction with section 1(1) of the Basic Law ... .

(bb) In theory the criteria established by the Federal Court of Justice for interpreting the concept of "legitimate interest" used in section 23(2) of the KUG are irreproachable from the point of view of constitutional law.
According to the decision being appealed, the privacy meriting protection that must also be afforded to "figures of contemporary society par excellence" presupposes that they have retired to a secluded place with the objectively perceptible aim of being alone and in which, confident of being alone, they behave differently from how they would behave in public. The Federal Court of Justice accepted that there had been a breach of sections 22 and 23 of the KUG where this type of

picture was taken secretly or by catching the person unawares.
The criterion of a secluded place takes account of the aim, pursued by the general right to protection of personality rights, of allowing the individual a sphere, including outside the home, in which he does not feel himself to be the subject of permanent public attention – and relieves him of the obligation of behaving accordingly – and in which he can relax and enjoy some peace and quiet. This criterion does not excessively restrict press freedom because it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society, but allows them to be shown where they have appeared in public. In the event of an overriding public interest in being informed, the freedom of the press can even, in accordance with that case-law authority, be given priority over the protection of the private sphere ... .
The Federal Court of Justice properly held that it is legitimate to draw conclusions from the behaviour adopted in a given situation by an individual who is clearly in a secluded spot. However, the protection against dissemination of photos taken in that context does not only apply where the individual behaves in a manner in which he would not behave in public. On the contrary, the development of the personality cannot be properly protected unless, irrespective of their behaviour, the individual has a space in which he or she can relax without having to tolerate the presence of photographers or cameramen. That is not in issue here, however, since, according to the findings on which the Federal Court of Justice based its decision, the first of the conditions to which protection of private life is subject has not been met.
Lastly, there is nothing unconstitutional, when balancing the public interest in being informed against the protection of private life, in attaching importance to the method used to obtain the information in question ... . It is doubtful, however, that the mere fact of photographing the person secretly or catching them unawares can be deemed to infringe their privacy outside the home. Having regard to the function attributed to that privacy under constitutional law and to the fact that it is usually impossible to determine from a photo whether the person has been photographed secretly or caught unawares, the existence of unlawful interference with that privacy cannot in any case be made out merely because the photo was taken in those conditions. As, however, the Federal Court of Justice has already established in respect of the photographs in question that the appellant was not in a secluded place, the doubts expressed above have no bearing on the review of its decision.

(cc) However, the constitutional requirements have not been satisfied in so far as the decisions of which the appellant complains did not take account of the fact that the right to protection of personality rights of a person in the appellant's situation is strengthened by section 6 of the Basic Law regarding that person's intimate relations with their children.

(dd) The following conclusions can be drawn from the foregoing considerations with regard to the photographs in question:
The decision of the Federal Court of Justice cannot be criticised under constitutional law regarding the photos of the appellant at a market, doing her market shopping accompanied by her bodyguard or dining with a male companion at a well-attended restaurant. The first two cases concerned an open location frequented by the general public. The third case admittedly concerned a well circumscribed location, spatially speaking, but one in which the appellant was exposed to the other people present.
It is for this reason, moreover, that the Federal Court of Justice deemed it legitimate to ban photos showing the applicant in a restaurant garden, which were the subject of the decision being appealed but are not the subject of the constitutional appeal.
The presence of the applicant and her companion there presented all the features of seclusion. The fact that the photographs in question were evidently taken from a distance shows that the applicant could legitimately have assumed that she was not exposed to public view.
Nor can the decision being appealed be criticised regarding the photos of the applicant alone on horseback or riding a bicycle. In the Federal Court of Justice's view, the appellant had not been in a secluded place, but in a public one. That finding cannot attract criticism under constitutional law. The applicant herself describes the photos in question as belonging to the intimacy of her private sphere merely because they manifest her desire to be alone. In accordance with the criteria set out above, the mere desire of the person concerned is not relevant in any way.
The three photos of the applicant with her children require a fresh examination, however, in the light of the constitutional rules set out above. We cannot rule out the possibility that the review that needs to be carried out in the light of the relevant criteria will lead to a different result for one or other or all the photos. The decision must therefore be set aside in that respect and remitted to the Federal Court of Justice for a fresh decision.

(d) The decisions of the Regional Court and the Court of Appeal resulted in a violation of fundamental rights by limiting to the home the privacy protected by section 2(1) read in conjunction with section 1(1) of the Basic Law in accordance, moreover, with a rationale that was in keeping with the case-law at the time.
The decisions in question do not need to be set aside, however, since the violation complained of has been remedied in part by the Federal Court of Justice and the remainder of the case remitted to that court.
..."

(e) Sequel to the proceedings

26. Following the remittal of the case to the Federal Court of Justice in connection with the three photos that had appeared in Bunte magazine (edition no. 32 of 5 August 1993 and no. 34 of 19 August 1993) showing the applicant with her children, Burda publishers undertook not to republish the photos (Unterlassungserklärung).

The second set of proceedings

[...]

(c) Decision of the Federal Constitutional Court of 4 April 2000

31. As the Court of Appeal did not grant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court relying on her earlier submissions.

32. In a decision of 4 April 2000 the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal. It referred in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.

The third set of proceedings

[...]

(c) The decision of the Federal Constitutional Court of 13 April 2000

37. As the Court of Appeal did not grant the applicant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court on the basis of her earlier submissions.

38. In a decision of 13 April 2000 the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal, referring in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.
The Constitutional Court held that the ordinary courts had properly found that the Monte Carlo Beach Club was not a secluded place and that the photos of the applicant wearing a swimsuit and falling down were not capable of constituting an infringement of her right to respect for her private life.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

A. The Basic Law

39. The relevant provisions of the Basic Law are worded as follows:

Section 1(1): "The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it."

Section 2(1): "Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law (Sittengesetz)."

Section 5(1): "(1) Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

(2) These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour (Recht der persönlichen Ehre)."

Section 6(1) and (2): "(1) Marriage and the family enjoy the special protection of the State.
(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent on them. The State community shall oversee the performance of that duty."

B. The Copyright (Arts Domain) Act

40. Section 22(1) of the Copyright (Arts Domain) Act provides that images can only be disseminated with the express approval of the person concerned.

41. Section 23(1) no. 1 of that Act provides for exceptions to that rule, particularly where the images portray an aspect of contemporary society (Bildnisse aus dem Bereich der Zeitgeschichte) on condition that publication does not interfere with a legitimate interest (berechtigtes Interesse) of the person concerned (section 23(2)).

C. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

42. The full text of this resolution, adopted by the Parliamentary Assembly on 26 June 1998, is worded as follows:
"1. The Assembly recalls the current affairs debate it held on the right to privacy during its September 1997 session, a few weeks after the accident which cost the Princess of Wales her life.
2. On that occasion, some people called for the protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention, while others believed that privacy was sufficiently protected by national legislation and the European Convention on Human Rights, and that freedom of expression should not be jeopardised.
3. In order to explore the matter further, the Committee on Legal Affairs and Human Rights organised a hearing in Paris on 16 December 1997 with the participation of public figures or their representatives and the media.
4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as "the right to live one's own life with a minimum of interference".
5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition.
6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy.
7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.
8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.
9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.
10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.
11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.
12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.
13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted.
14. The Assembly calls upon the governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy containing the following guidelines, or if such legislation already exists, to supplement it with these guidelines:
(i) the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;
(ii) editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;
(iii) when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;
(iv) economic penalties should be envisaged for publishing groups which systematically invade people's privacy;
(v) following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;
(vi) a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used "visual or auditory enhancement devices" to capture recordings that they otherwise could not have captured without trespassing;
(vii) provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;
(viii) the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.
15. It invites those governments which have not yet done so to ratify without delay the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.
16. The Assembly also calls upon the governments of the member states to:
(i) encourage the professional bodies that represent journalists to draw up certain criteria for entry to the profession, as well as standards for self-regulation and a code of journalistic conduct;
(ii) promote the inclusion in journalism training programmes of a course in law, highlighting the importance of the right to privacy vis-à-vis society as a whole;
(iii) foster the development of media education on a wider scale, as part of education about human rights and responsibilities, in order to raise media users' awareness of what the right to privacy necessarily entails;
(iv) facilitate access to the courts and simplify the legal procedures relating to press offences, in order to ensure that victims' rights are better protected."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicant submitted that the German court decisions had infringed her right to respect for her private and family life guaranteed by Article 8 of the Convention, which is worded as follows:
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions of the parties and interveners

1. The applicant

44. The applicant stated that she had spent more than ten years in unsuccessful litigation in the German courts trying to establish her

right to the protection of her private life. She alleged that as soon as she left her house she was constantly hounded by paparazzi who followed her every daily movement, be it crossing the road, fetching her children from school, doing her shopping, out walking, practising sport or going on holiday. In her submission, the protection afforded to the private life of a public figure like herself was minimal under German law because the concept of a "secluded place" as defined by the Federal Court of Justice and the Federal Constitutional Court was much too narrow in that respect. Furthermore, in order to benefit from that protection the onus was on her to establish every time that she had been in a secluded place. She was thus deprived of any privacy and could not move about freely without being a target for the paparazzi. She affirmed that in France her prior agreement was necessary for the publication of any photos not showing her at an official event. Such photos were regularly taken in France and then sold and published in Germany. The protection of private life from which she benefited in France was therefore systematically circumvented by virtue of the decisions of the German courts. On the subject of the freedom of the press the applicant stated that she was aware of the essential role played by the press in a democratic society in terms of informing and forming public opinion, but in her case it was just the entertainment press seeking to satisfy its readers' voyeuristic tendencies and make huge profits from generally anodyne photos showing her going about her daily business. Lastly, the applicant stressed that it was materially impossible to establish in respect of every photo whether or not she had been in a secluded place. As the judicial proceedings were generally held several months after publication of the photos, she was obliged to keep a permanent record of her every movement in order to protect herself from paparazzi who might photograph her. With regard to many of the photos that were the subject of this application it was impossible to determine the exact time and place at which they had been taken.

2. The Government

45. The Government submitted that German law, while taking account of the fundamental role of the freedom of the press in a democratic society, contained sufficient safeguards to prevent any abuse and ensure the effective protection of the private life of even public figures. In their submission, the German courts had in the instant case struck a fair balance between the applicant's rights to respect for her private life guaranteed by Article 8 and the freedom of the press guaranteed by Article 10, having regard to the margin of appreciation available to the State in this area. The courts had found in the first instance that the photos had not been taken in a secluded place and had, in the second instance, examined the limits on the protection of private life, particularly in the light of the freedom of the press and even where the publication of photos by the entertainment press were concerned. The protection of the private life of a figure of contemporary society "par excellence" did not require the publication of photos without his or her authorisation to be limited to showing the person in question engaged in their official duties. The public had a legitimate interest in knowing how the person behaved generally in public. The Government submitted that this definition of the freedom of the press by the Federal Constitutional Court was compatible with Article 10 and the European Court's relevant case-law. Furthermore, the concept of a secluded place was only one factor, albeit an important one, of which the domestic courts took account when balancing the protection of private life against the freedom of the press. Accordingly, while private life was less well protected where a public figure was photographed in a public place other factors could also be taken into consideration, such as the nature of the photos, for example, which should not shock the public. Lastly, the Government reiterated that the decision of the Federal Court of Justice – which had held that the publication of photos of the applicant with the actor Vincent Lindon in a restaurant courtyard in Saint-Rémy-de-Provence were unlawful – showed that the applicant's private life was protected even outside her home.

3. The interveners

46. The Association of Editors of German Magazines submitted that German law, which was half way between French law and United Kingdom law, struck a fair balance between the right to protection of private life and the freedom of the press. In its submission, it also complied with the principles set out in Resolution no. 1165 of the Council of Europe on the right to privacy and the European Court's case-law, which had always stressed the fundamental role of the press in a democratic society.
The public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other reasons. The press's role of "watchdog" could not be narrowly interpreted here. In that connection account should also be taken of the fact that the boundary between political commentary and entertainment was becoming increasingly blurred. Given that there was no uniform European standard concerning the protection of private life, the State had a wide margin of appreciation in this area.
47. Burda joined the observations of the Association of Editors of German Magazines and stated that German law required the courts to balance the competing interests of informing the public and protecting the right to control of the use of one's image very strictly and on a case by case basis. Even figures of contemporary society "par excellence" enjoyed a not inconsiderable degree of protection and recent case-law had even tended towards reinforcing that protection. Since the death of her mother in 1982 the applicant had officially been First Lady of the reigning family in Monaco and was as such an example for the public (Vorbildfunktion). Moreover, the Grimaldi family had always sought to attract media attention and was therefore itself responsible for the public interest in it. The applicant could not therefore, especially if account were taken of her official functions, be regarded as a victim of the press. The publication of the photos in question had not infringed her right to control the use of her image because they had been taken while she was in public and had not been damaging to her reputation.

B. The Court's assessment

1. As regards the subject of the application

48. The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003. The same applies to the photos published in *Freizeit Revue* magazine (edition no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence (see paragraph 11 above). In its judgment of 19 December 1995 the Federal Court of Justice prohibited any further publication of the photos on the ground that they infringed the applicant's right to respect for her private life (see paragraph 23 above).

49. Accordingly, the Court considers it important to specify that the present application concerns the following photos, which were published as part of a series of articles about the applicant:
(i) the photo published in *Bunte* magazine (edition no. 32 of 5 August 1993) showing the applicant on horseback (see paragraph 12 above)
(ii) the photos published in *Bunte* magazine (edition no. 34 of 19 August 1993) showing the applicant shopping on her own; with Mr Vincent Lindon in a restaurant; alone on a bicycle; and with her bodyguard at a market (see paragraph 13 above);
(iii) the photos published in *Bunte* magazine (edition no. 10 of 27 February 1997) showing the applicant on a skiing holiday in Austria (see paragraph 14 above);
(iv) the photos published in *Bunte* magazine (edition no. 12 of 13 March 1997) showing the applicant with Prince Ernst August von Hannover or alone leaving her Parisian residence (see paragraph 15 above);
(v) the photos published in *Bunte* magazine (edition no. 16 of 10 April 1997 showing the applicant playing tennis with Prince Ernst August von Hannover or both of them putting their bicycles down (see paragraph 16 above);
(vi) the photos published in *Neue Post* magazine (edition no. 35/97) showing the applicant tripping over an obstacle at the Monte Carlo Beach Club (see paragraph 17 above).

2. As regards the applicability of Article 8

50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), or a person's picture (see Schüssel v. Austria (dec.), no. 42409/98, 21 February 2002). Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, mutatis mutandis, Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29, and Botta v. Italy, judgment of 24 February 1998, Reports of Judgments and Decisions 1998-I, p. 422, § 32). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see, mutatis mutandis, P.G. and J.H. v. the United Kingdom, no. 44787/98, § 56, ECHR 2001-IX, and Peck v. the United Kingdom, no. 44647/98, § 57, ECHR 2003-I.).

51. The Court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant "would have had a reasonable expectation of privacy for such calls" (see Halford v. the United Kingdom, judgment of 25 June 1997, Reports 1997-III, p.1016, § 45).

52. As regards photos, with a view to defining the scope of the protection afforded by Article 8 against arbitrary interference by public authorities, the Commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public (see, mutatis mutandis, Friedl v. Austria, judgment of 31 January 1995, Series A no. 305-B, Friendly Settlement, Commission opinion, p. 21, §§ 49-52; P.G. and J.H., cited above, § 58; and Peck, cited above, § 61).

53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.

3. Compliance with Article 8

a. The domestic courts' position

54. The Court notes that, in its landmark judgment of 15 December 1999, the Federal Constitutional Court interpreted sections 22 and 23 of the Copyright (Arts Domain) Act (see paragraphs 40-41 above) by balancing the requirements of the freedom of the press against those of the protection of private life, that is, the public interest in being informed against the legitimate interests of the applicant. In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "par excellence", enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the public eye "to which the person concerned retires with the objectively recognisable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public". In the light of those criteria the Federal Constitutional Court held that the Federal Court of Justice's judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions (see paragraph 25 above).

55. Referring to its landmark judgment, the Federal Constitutional Court did not entertain the applicant's appeals in the subsequent proceedings brought by her (see paragraphs 32 and 38 above).

b. The general principles governing the protection of private life and the freedom of expression

56. In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

57. The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, mutatis mutandis, X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; Stjerna v. Finland, judgment of 25 November 1994, Series A no. 299-B, p. 61, § 38; and Verliere v. Switzerland (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others (see Schüssel, cited above).
The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among many other authorities, Keegan v. Ireland, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and Botta, cited above, p. 427, § 33).

58. That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention. In that context the Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see Handyside v. the United Kingdom, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).
In that connection the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A no. 216, p. 29-30, § 59, and Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 59, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; Tammer v. Estonia, no. 41205/98, § 59-63, ECHR 2001-I; and Prisma Press v. France (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

60. In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, as a recent authority, News Verlags GmbH & CoKG v. Austria, no. 31457/96, § 52 et seq., ECHR 2000-I, and Krone Verlag GmbH & Co. KG v. Austria, no. 34315/96, § 33 et seq., 26 February 2002). The Court thus found, in one case, that the use of certain terms in relation to an individual's private life was not "justified by considerations of public concern" and that those terms did not "[bear] on a matter of general importance" (see Tammer, cited above, § 68) and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of "major public concern" and that the published photographs "did not disclose any details of [the] private life" of the person in question (see Krone Verlag, cited above, § 37) and held that there had been a violation of Article 10. Similarly, in a recent case concerning the publication by President Mitterand's former private doctor of a book containing revelations about the President's state of health, the Court held that "the more time passed the more the public interest in President Mitterand's two seven-year presidential terms prevailed over the requirements of the protection of his rights with regard to medical confidentiality" (see Plon (Société) v. France, no. 58148/00, 18 May 2004) and held that there had been a breach of Article 10.

c. Application of these general principles by the Court

61. The Court points out at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday. The photos, in which the applicant appears sometimes alone and sometimes in company, illustrate a series of articles with such anodyne titles as 'Pure happiness", "Caroline ... a woman returning to life", "Out and about with Princess Caroline in Paris" and "The kiss. Or: they are not hiding anymore ..." (see paragraphs 11-17 above).
62. The Court also notes that the applicant, as a member of the Prince of Monaco's family, represents the ruling family at certain cultural or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or one of its institutions (see paragraph 8 above).
63. The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians

in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest (Observer and Guardian, cited above, ibid.) it does not do so in the latter case.

64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see Plon (Société), cited above, ibid.), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.

65. As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public (see, mutatis mutandis, Jaime Campmany y Diez de Revenga and Juan Luís Lopez-Galiacho Perona v. Spain (dec.), no. 54224/00, 12 December 2000; Julio Bou Gibert and El Hogar Y La Moda J. A. v. Spain (dec.), no. 14929/02, 13 May 2003; and Prisma Presse, cited above).

66. In these conditions freedom of expression calls for a narrower interpretation (see Prisma Presse, cited above, and, by converse implication, Krone Verlag, cited above, § 37).
67. In that connection the Court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the "one-sided interpretation of the right to freedom of expression" by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that "their readers are entitled to know everything about public figures" (see paragraph 42 above, and Prisma Presse, cited above).

68. The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant's knowledge or consent –and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see paragraph 59 above).
In the present case this point is illustrated in particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down (see paragraph 17 above). It appears that these photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists and photographers' access to the club was strictly regulated (see paragraph 33 above).

69. The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life (see paragraph 51 above and, mutatis mutandis, Halford, cited above, § 45).
70. Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data (see point 5 of the Parliamentary Assembly's resolution on the right to privacy – see paragraph 42 above and, mutatis mutandis, Amann v. Switzerland [GC], no. 27798/95, § 65-67, ECHR 2000-II; Rotaru v. Romania [GC], no. 28341/95, § 43-44, ECHR 2000-V; P.G. and J.H., cited above, § 57-60, ECHR 2001-IX; and Peck, cited above, §§ 59-63, and § 78). This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public.
71. Lastly, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Artico v. Italy, judgment of 13 May 1980, Series A no. 37, p. 15-16, § 33).

72. The Court has difficulty in agreeing with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society "par excellence". Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions.
In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.

73. Lastly, the distinction drawn between figures of contemporary society "par excellence" and "relatively" public figures has to be clear and obvious so that, in a state governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

74. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society "par excellence" she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society "par excellence" does not suffice to justify such an intrusion into her private life.

d. Conclusion

76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

80. There has therefore been a breach of Article 8 of the Convention.

81. Having regard to that finding, the Court does not consider it necessary to rule on the applicant's complaint relating to her right to respect for her family life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:
"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contract-

ing Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

83. The applicant claimed 50,000 (EUR) in non-pecuniary damage on the ground that the German courts' decisions prevented her from leading a normal life with her children without being hounded by the media. She also claimed EUR 142,851.31 in reimbursement of her costs and expenses for the many sets of proceedings she had had to bring in the German courts.
84. The Government contested the amounts claimed. As regards non-pecuniary damage, they reiterated that, under German law, the applicant enjoyed protection of her private life even outside her home, particularly where her children were concerned. With regard to costs and expenses, they submitted that not all the proceedings could be taken into account, that the value of parts of the subject-matter was less than the amount stated, and that the legal fees being claimed, in view of the amount concerned, could not be reimbursed.

85. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that the question of the application of Article 41 is not ready for decision; and
accordingly,
(a) reserves the said question in whole;
(b) invites the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.
Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 June 2004.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

I am of the opinion that there has been a violation of Article 8 of the Convention, but am unable to follow the entire reasoning of the majority.

1. My colleagues state in their conclusions that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" and that "the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and she is well known to the public".
In the majority's view the publication of the photos and articles in question was not such as to contribute to a debate of general interest because the applicant was not performing official functions and the published photos and accompanying commentaries related exclusively to details of her private life.
In my view, however, the applicant is a public figure and the public does have a right to be informed about her life.
The solution therefore needs to be found in the fair balance that has to be struck between the applicant's right to her private life and the public's right to be informed.

2. The applicant is a public figure, even if she does not perform any function within or on behalf of the State of Monaco or one of its institutions.
Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain – paragraph 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy (see paragraph 42 of the judgment).
It is well known that the applicant has for years played a role in European public life, even if she does not perform any official functions in her own country. To measure the degree of public interest in her, it is sufficient to look at the amount of media coverage devoted to her public or private life. Very recently the press drew attention to the fact that, on her arrival at the ceremony of the marriage of Crown Prince Felipe of Spain, the applicant was one of the people from Europe's and the world's high society to be the most widely greeted by the public.
The applicant is, in my view, a public figure and information about her life contributes to a debate of general interest. The general interest does not have to be limited to political debate.
As pointed out by the Parliamentary Assembly "certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens". If that is true of politicians it is also true for all other public figures in whom the public takes an interest.
It is therefore necessary to strike a balance between two fundamental rights: the right of public figures to respect for their private life and everyone's right to freedom of expression, which embraces the right of the public to be informed.
I agree with the majority that the private life of a public figure does not stop at their front door.
However, it has to be acknowledged that, in view of their fame, a public figure's life outside their home, and particularly in public places, is inevitably subject to certain constraints.
Fame and public interest inevitably give rise to a difference in treatment of the private life of an ordinary person and that of a public figure.
As the Federal Constitutional Court pointed out, "the public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements". Admittedly, determining the limit of a public figure's private life is no easy task.
Furthermore, a strict criterion might lead to solutions that do not correspond to the "nature of things".
It is clear that if the person is in an isolated spot everything that happens there must be covered by the protection of private life. It appears to me, however, that the criterion of spatial isolation used by the German courts is very restrictive. In my view, whenever a public figure has a "legitimate expectation" of being safe from the media his or her right to private life prevails over the right to freedom of expression or the right to be informed. It will never be easy to define in concrete terms the situations that correspond to this "legitimate expectation" and a case-by-case approach is therefore justified. This casuistic approach may also give rise to differences of opinion.
The majority attach importance, for example, to the fact that the photos at the Monte Carlo Beach Club had been taken secretly. I do not dispute the need to take account of the fact that the photos were taken from a distance, particularly if the person was somewhere they could legitimately believe did not expose them to public view. However, the beach club swimming pool was an open place frequented by the general public and, moreover, visible from the neighbouring buildings. Is it possible in such a place to entertain a reasonable expectation of not being exposed to public view or to the media? I do not think so. I believe that this same criterion is valid for photos showing the applicant in other situations in her daily life in which she cannot expect her private life to be protected.
I have in mind the photos of her doing her shopping. However, other photos – for example those of the applicant on horseback or playing tennis – were taken in places and circumstances that would call for the opposite approach.
It is thus in the knowledge of the limits to the exercise (I refer in this connection to Judge Zupancic's opinion) that I have found a violation of Article 8 of the Convention.

CONCURRING OPINION OF JUDGE ZUPANCIC

I adhere to the hesitations raised by my colleague, Judge Cabral Barreto. And while I find the distinctions between the different levels of permitted exposure, as defined by the German legal system, too Begriffsjurisprudenz-like, I nevertheless believe that the balancing test between the public's right to know on the one hand and the affected person's right to privacy on the other hand must be adequately performed. He who willingly steps upon the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.
Here I intend to concentrate not so much on the public's right to know – this applies first and foremost to the issue of the freedom of the press and the constitutional doctrine concerning it –, but rather on the simple fact that it is impossible to separate by an iron curtain private life from public performance. The absolute incognito existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people.

Privacy, on the other hand, is the right to be left alone. One has the right to be left alone precisely to the degree to which one's private life does not intersect with other people's private lives. In their own way, legal concepts such as libel, defamation, slander etc. testify to this right and to the limits on other people's meddling with it. The German private-law doctrine of Persönlichkeitsrecht testifies to a broader concentric circle of protected privacy. Moreover, I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press.
The Persönlichkeitsrecht doctrine imparts a higher level of civilized interpersonal deportment.
It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.
The question here is how to ascertain and assess this balance. I agree with the outcome of this case. However, I would suggest a different determinative test: the one we have used in Halford v. United Kingdom, judgment of 25/06/1997, Reports 1997-III, which speaks of "reasonable expectation of privacy."
The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in Halford do not prevent us from employing the same test in cases such as the one before us.
The dilemma as to whether the applicant here was or was not a public figure, ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. Perhaps is this what Judge Cabral Barreto has in mind when he refers to the emerging case-law concerning the balancing exercise between the public's right to know and the private person's right to shield him- or herself.
Of course, one must avoid a circuitous reasoning here. The "reasonableness" of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones.

Noot

Gerard Schuijt
Prof. mr. G.A.I. Schuijt was hoofddocent mediarecht aan de Universiteit van Amsterdam en bijzonder hoogleraar aan de Universiteit Leiden.

Caroline von Hannover, dochter van prins Rainier III van Monaco, beklaagt zich bij het Europese Hof over schending door Duitsland van haar recht op bescherming van de persoonlijke levenssfeer tegenover de roddelpers, ook wel entertainmentpers genoemd. De prinses procedeerde tegen de publicatie van foto's van haar, al dan niet in gezelschap van haar kinderen of vrienden. Slechts met betrekking tot de publicatie van één foto vond zij gehoor bij het Bundesgerichtshof. Later oordeelde het Bundesverfassungsgericht (BVFG) nog dat ook de publicatie van de foto's van haar met haar kinderen in strijd was met de grondwettelijke bescherming van gezinsleven en opvoeding. Maar dat was de prinses niet genoeg. Tal van andere foto's hadden volgens haar ook niet mogen worden gepubliceerd. Zie voor een omschrijving van de foto's met bijschriften par. 9-17. Van de Duitse rechters zijn hierboven alleen de door het EHRM geciteerde overwegingen van het Bundesverfassungsgericht opgenomen (par. 25), voor de overwegingen van lagere rechters raadplege men de op www.echr.coe.int volledig gepubliceerde uitspraak.

In dit arrest blijkt het Europese Hof een andere benadering van dit conflict voor te staan dan de Duitse rechter en zoals de Nederlandse rechter in een geval als dit pleegt te doen. Het arrest kan dus ook voor de rechtspraak te onzent van belang zijn. Het gaat daarbij vooral om de uitleg van begrippen als 'public figure' en 'publiek belang' en de afbakening van wat 'public figures' aan belangstelling van de zijde van de media hebben te accepteren of niet. Om het belang van het arrest te illustreren zal ik hieronder eerst kort uiteenzetten hoe de Duitse rechtspraak de privacybescherming van bekende personen benadert. Daarna zet ik summier de benadering volgens de Nederlandse rechtspraak uiteen om vervolgens de andere benadering van het EHRM in het licht te kunnen zetten. Voorts besteed ik kort aandacht aan twee interessante concurring opinions en probeer ik de consequenties van het arrest voor onze rechtspraak aan te geven.

Het Duitse portretrecht zit iets anders in elkaar dan het Nederlandse. De algemene regel is dat men in Duitsland een verbodsrecht heeft ten aanzien van de publicatie van zijn portret. Daarop geldt echter een uitzondering. 'Bildnisse aus dem Bereich der Zeitgeschichte' mogen zonder toestemming worden gepubliceerd, echter voor zover een legitiem belang van de geportretteerde zich daartegen niet verzet (art. 22 en 23 van de Kunsturhebergesetz). Het 'redelijk belang' van de zogenaamde 'Personen der Zeitgeschichte' leidt in de Duitse rechtspraak evenals bij ons tot een belangenafweging tussen het belang van de persvrijheid aan de ene kant en dat van de privacybescherming aan de andere kant. Daarbij – men leze de overwegingen van het BVFG – wordt ten gunste van de vrijheid van de media een ruime opvatting gehanteerd. Entertainment draagt ook bij aan de publieke meningsvorming. Bekende personen belichamen bepaalde morele waarden en vervullen een voorbeeldfunctie of rolmodel door de wijze waarop zij leven en zich gedragen. Daarom is het publiek geïnteresseerd in de 'ups and downs occurring their lives'. Dit geldt niet alleen voor politici maar ook voor andere bekende persoonlijkheden uit de showbizz-wereld, de sport en dergelijke. De functie van de pers is te laten zien hoe zij in het openbaar verschijnen en zich gedragen en dat is niet beperkt tot de vervulling van specifieke functies of tot speciale gelegenheden van politieke of historische betekenis. Het Duitse recht maakt voorts onderscheid tussen absolute Personen der Zeitgeschichte, die 'als zodanig' nieuws vormen (in het hier besproken arrest vertaald met 'figure of contemporary society par excellence') en relatieve Personen der Zeitgeschichte, die in het nieuws zijn gekomen doordat zij bij een bepaalde gebeurtenis betrokken waren (zie ook A. J. Nieuwenhuis, *Tussen privacy en persoonlijkheidsrecht*, Nijmegen: Ars Aequi Libri 2001, p. 85-112, i.h.b. p. 102.). Caroline van Hannover werd aangemerkt als een absolute Person der Zeitgeschichte. Public figures zijn echter niet geheel onbeschermd. Zij kunnen, zoals gezegd, een redelijk belang aanvoeren. Dat hebben zij zonder meer in eigen huis en tuin, maar de bescherming van hun privacy houdt niet op als zij hun voordeur achter zich dicht trekken. Zij hebben ook buitenshuis recht op bescherming, namelijk als zij zich hebben afgezonderd op een plek waar zij duidelijk behoefte hebben om alleen te zijn en waar zij, in het vertrouwen dat zij alleen zijn, zich anders kunnen gedragen dan wanneer zij zich in het openbaar vertonen. Op grond van deze overwegingen oordeelde het Bundesgerichtshof volgens het BVFG terecht dat de foto van de prinses, toen zij met de acteur Vincent Landon zat te eten ergens op een afgeschermde plek achter in de tuin van een restaurant, niet gepubliceerd mocht worden. Dat was dan ook de enige keer dat de prinses gelijk had gekregen van de lagere rechter (en die foto is dus ook niet meer aan de orde in Straatsburg; par. 48). Maar een openbaar zwembad als de Monte Carlo Beach Club werd niet als zo'n afgeschermde plek beschouwd, ook al was fotograferen er ten strengste verboden en was de gewraakte foto met een telelens van buiten het zwembad genomen (par. 38). Wel geeft het Duitse recht extra bescherming aan kinderen van bekende personen op grond van artikel 6 van de Duitse Grondwet. Zo stelt het Bundesverfassungsgericht de prinses in het gelijk met betrekking tot de foto's van haar met haar kinderen. Ook die foto's zijn in Straatsburg niet meer aan de orde, par. 48. Kort samengevat dus: een ruim begrip van 'public figures'; public figures zijn in eigen huis en tuin beschermd; vertonen zij zich buitenshuis dan zal de belangenafweging in het algemeen in het voordeel van de persvrijheid uitvallen, tenzij zij zich bevinden op een duidelijk als zodanig kenbare afgeschermde plaats.

Het portretrecht in Nederland is geen verbodsrecht, althans met betrekking tot niet in opdracht gemaakte portretten. Het 'redelijk belang' van artikel 21 Auteurswet leidt tot een belangenafweging aan de hand van alle omstandigheden van het geval. Weliswaar is de bescherming van de persoonlijke levensfeer in beginsel een redelijk belang, maar dat sluit die belangenafweging niet uit: HR 1 juli 1988, *NJ* 1988, 1000 (*Vondelpark*); HR 21 januari 1994, *NJ* 1994, 473 (*Ferdi E.*). Elke omstandigheid kan in de belangenafweging betrokken worden. De aard, de ernst en de duur van de inbreuk komen in de weegschaal te liggen tesamen met de persoon om wie het gaat, de juistheid van de (bijgaande) informatie, de contekst waarin het portret werd gepubliceerd, de plaats waar en wijze waarop de foto tot stand kwam en het maatschappelijk belang van de desbetreffende publicatie, hetgeen er ook bij ons toe leidt dat public figures (zowel politici als andere bekende Nederlanders) meer moeten dulden dan andere personen, maar toch ook weer niet vogelvrij zijn (bijvoorbeeld naarmate de inbreuk ernstiger is en het maatschappelijk belang van de publicatie minder). Zie *Onrechtmatige Daad* (losbladig), VII, aant. 111. Anders dan in het Duitse recht begint de belangenafweging dus niet bij bekende personen, maar zijn de vragen of men bekende persoon is en waar men zich bevindt omstandigheden van het geval die in een integrale belangenafweging worden betrokken.

Hoewel artikel 8 EVRM volgens het Hof in essentie bescherming verleent tegen inmenging van de overheid in de persoonlijke levenssfeer van de burger, verplicht het de overheid niet louter tot onthouding.

Het artikel impliceert volgens het EHRM een positieve verplichting voor de overheid om ervoor te zorgen dat de persoonlijke levenssfeer ook door medeburgers wordt gerespecteerd (par. 57). Deze derdenwerking van het grondrecht had het Hof al eerder erkend, zoals ook onze eigen Hoge Raad in het arrest over de Edamse bijstandsvrouw: HR 9 januari 1987, *NJ* 1987, 928.

Met betrekking tot de klacht van Caroline von Hannover stelt het EHRM voorop dat de bescherming van de persoonlijke levenssfeer moet worden afgewogen tegen de vrijheid van expressie die in artikel 10 wordt gegarandeerd (par. 58). In dat kader brengt het Hof enkele principiële overwegingen met betrekking tot het belang van de persvrijheid in herinnering (par. 58), die ik hier niet hoef te herhalen.

Bij die belangenafweging is het beslissende punt van het Hof de vraag of het gaat om een bijdrage aan het maatschappelijk debat of, anders gezegd, of de inbreuk op de persoonlijke levenssfeer wordt gerechtvaardigd door overwegingen van publiek belang, zoals de bijdrage aan het publieke debat ook bij andere perspublicaties vaak doorslaggevend is om een beperking van een desbetreffende uiting in strijd met artikel 10 EVRM te vinden (par. 59 en 60). Dat was ook het geval in voorgaande portretrechtzaken, waarin het Hof een publicatieverbod in strijd achtte met artikel 10 EVRM: EHRM 11 januari 2000, *Mediaforum* 2000-3, nr. 14 (*News Verlag*) en EHRM 26 februari 2002, appl. nr. 34315/96 (*Krone Verlag*).

Ten opzichte van de Duitse rechterlijke beslissingen legt het Hof drie beperkingen aan. De eerste is dat het Caroline van Hannover niet wil aanmerken als een absolute Person der Zeitgeschichte. Het Hof benadrukt dat de prinses weliswaar behoort tot de familie van de Prins van Monaco en als zodanig die familie soms representeert bij bepaalde gebeurtenissen, maar dat zij geen enkele functie uitoefent in de staat Monaco of in een der instellingen van die staat (par. 62, 63 en 72). Sterker nog, het Hof tikt Duitsland op de vingers met zijn overweging dat het onderscheid tussen absolute en relatieve Personen der Zeitgeschichte helder en duidelijk zou moeten zijn, zodat men zou weten waar men aan toe is, hetgeen in Duitsland volgens het Hof niet het geval is (par. 73 en 74). Het tweede verschil is dat het Hof nadruk legt op het privé-karakter van aangelegenheden in het openbaar als paardrijden, boodschappen doen en het bezoeken van restaurants (par. 61), welke informatie niet kan worden beschouwd als een bijdrage aan enig debat over publieke aangelegenheden (par. 65), terwijl de Duitse rechter voor de openbare meningsvorming ook belang hecht aan entertainment en de rolmodelfunctie van public figures. Het derde verschil is dat het Hof eerder geneigd is te spreken van een duidelijk als zodanig kenbare afgezonderde plaats doordat het meer belang hecht aan de omstandigheid dat de toegang van journalisten en fotografen tot de Monte Carlo Beach Club strikt was gereguleerd en de foto's van de prinses aldaar heimelijk vanaf grote afstand genomen waren. Anders dan de Duitse rechter vindt het Hof dat de prinses er daar op mocht vertrouwen dat haar privacy er beschermd was (par. 68 en 69). Ook het criterium van de duidelijk kenbare afgezonderde plaats vindt het Hof niet duidelijk genoeg (par. 75).

Wat de gevolgen zijn voor de Nederlandse rechtspraak is minder duidelijk dan voor de Duitse. De Nederlandse rechter hecht niet op voorhand belang aan één omstandigheid, maar weegt álle omstandigheden van het geval, dus ook of en *in welke mate* inbreuk wordt gemaakt op de persoonlijke levenssfeer. Foto's van intimiteiten, waar ook gemaakt, zelfs gemaakt op de openbare weg, kunnen dan al gauw niet door de beugel: HR 1 juli 1988, *NJ* 1988, 1000 (*Vondelpark*); Rb. Amsterdam 10 juli 1996, *Mediaforum* 1996-10, p. B136-B138 (*Wastelandparty*). In deze twee zaken betroffen de foto's geen public figures, maar Karin Bloemen is dat wel en zij ageerde met succes tegen publicatie van een foto van haar op een openbaar naaktstrand (Rb. Amsterdam 13 oktober 2003, *Mediaforum* 2004-1, nr. 2) Tegen publicatie van onschuldiger foto's kan men minder gauw een redelijk belang aanvoeren: Pres. Rb. Amsterdam 18 december 1997, *Mediaforum* 1998-2, nr.8 (*Catherine Keyl in zondoorlaatbaar badpak*); Rb. Amsterdam 7 mei 2003, LJN-nr. AF8332 (*Paul de Leeuw met zijn zoontje op de fiets*) en eigenlijk vond ook Hof Amsterdam (27 april 1989, *AMI* 1989-5, p. 125-126) de Vondelparkfoto van het gearmd lopende paartje tamelijk onschuldig, maar hechtte belang aan de onverhoedse wijze waarop de foto was genomen en de contekst waarin zij was gepubliceerd. Wat betreft bekende Nederlanders erkent de Nederlandse rechtspraak dat zij zich meer moeten laten welgevallen, maar voor kinderen (en zeker kinderen van een lid van de koninklijke familie dat geen troonaanspraken en geen officiële functie meer heeft) gaat dat minder snel op: HR 4 maart 1988, *NJ* 1989, 361 (*Kinderen prinses Irene*). Voor anderen, bijvoorbeeld zij die zichzelf hebben blootgesteld aan de publieke belangstelling geldt dat de belangenafweging eerder ten gunste van de vrijheid van de media uitvalt: HR 21 januari 1994, *NJ* 1994, 473 (*Ferdi E.*). Maar steeds afhankelijk van de omstandigheden.

Ik kan in het onderhavige arrest geen aanwijzingen vinden dat het Hof deze Nederlandse *benadering* zal afkeuren. Maar ik lees in het arrest van het Hof een aanhalen van de banden ten gunste van de bescherming van de privacy tégen de entertainmentpers en dat zou gevolgen kunnen hebben voor het gewicht dat de Nederlandse rechter aan bepaalde omstandigheden gaat geven. Ik lees dat in de nadruk op de 'decisive factor', de vraag of de publicatie van een portret bijdraagt aan het publieke debat, wat het Hof enger opvat dan publieke meningsvorming (dat volgens de Duitse rechter ook bijvoorbeeld mode en lifestyle betreft) (par. 76) en op de nadruk dat de prinses geen functies vervult in de staat Monaco (alsof iemand de politiek van dat staatje interesseert). Het Hof vindt ook dat het publiek niet een legitiem belang heeft te weten wat de prinses doet als zij in het openbaar verschijnt, ook al is zij een bekende persoonlijkheid (par. 77). Ik lees het ook in overwegingen als par. 66 'In these conditions freedom of expression calls for a narrower interpretation' en de verwijzing naar de – integraal in par. 42 opgenomen – resolutie van de Parlementaire Vergadering van de Raad van Europa 'which stresses the "one-sided interpretation of the right to freedom of expression" by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that "their readers are entitled to know everthing about public figures"' (par. 67) en tenslotte in de overweging dat de contekst waarin de foto's zijn genomen zonder dat de prinses het wist en de kwelling ('continual harassment') die veel public figures in hun dagelijks leven ondervinden, niet buiten beschouwing kunnen blijven (par. 59 en 68). Kortom, het EHRM laat de privacy, ook van bekende personen, zwaar wegen en ik acht het niet uitgesloten, dat de Nederlandse rechter daar in zal meegaan, voorzover hij dat al niet deed.

Het is opvallend dat twee rechters het met het resultaat eens zijn, maar niet met de overwegingen die het Hof daartoe brachten. Rechter Barreto vindt prinses Carolina een public figure is en het publiek heeft volgens hem een recht over haar te worden geïnformeerd. Hij hangt een ruimere opvatting aan van wat een bijdrage aan 'a debate of general interest' is, waarvoor ook hij verwijst naar de resolutie van de Parlementaire vergadering van de Raad van Europa. Rechter Supancic hecht aan de reasonable expectation of privacy als criterium en vindt dat public figures haar minder gauw mogen koesteren, maar beiden zien uiteindelijk de oplossing in een belangenafweging aan de hand van de omstandigheden.

Wat mij opvalt is, dat het Hof dat óók als uitgangspunt die belangenafweging tussen twee grondrechten neemt, de klacht slechts vanuit één hoek, de privacybescherming bekijkt en zich dan afvraagt of er een maatschappelijke noodzaak is inbreuk op dat recht te maken (en die is er niet vanwege het ontbreken van een bijdrage aan het publieke debat). Daarmee beoordeelt het Hof impliciet de noodzaak van de publicatie, terwijl het dat, als het een beperking van de uitingsvrijheid beoordeelt, juist niet doet. Dan beoordeelt het de noodzaak van de beperking op de uitingsvrijheid (waarbij onder meer van belang is of de gewraakte uitlating een bijdrage levert aan het publieke debat). In zijn bijdrage aan de De Meij-bundel signaleert A.J. Nieuwenhuis reeds dit probleem (A.J. Nieuwenhuis, 'Het EHRM en het belang van het publiek', in: A.W. Hins & A.J. Nieuwenhuis (red.) *Van ontvanger naar zender,* Amsterdam: Cramwinckel 2003, p.269-272). Hij formuleert het probleem aldus: Krijgt de burger over wie bericht is gelijk, dan zal er sprake zijn van een beperking van de persvrijheid, die onder de werking van het verdrag geoorloofd zal moeten zijn. Meent de rechter dat de persvrijheid het zwaarste moet wegen, dan zal de inbreuk op de privacy acceptabel moeten zijn. Kan de rechter echter, vraagt Nieuwenhuis, één van beide grondrechten voorop stellen en zich derhalve concentreren op één noodzakelijkheidstoets of moet hij steeds een dubbele noodzakelijkheidstoets toepassen? Om uit dit probleem te geraken ziet Nieuwenhuis bij uitlatingen die deel uitmaken van het politieke debat maar niet de kern van de privacy raken, de uitingsvrijheid als vertrekpunt. Omgekeerd acht hij het voor de hand te liggen dat bij uitlatingen die de kern van de privacy raken maar geen deel uitmaken van het publieke debat, de toets aan artikel 8 EVRM vooropstaat. Moeilijker ligt het bij publicaties die bijdragen aan het maatschappelijk debat en tegelijkertijd privacygevoelige informatie bevatten. Dan zal de rechter beide toetsen moeten toepassen en dat in zijn motivering van het uiteindelijke resultaat van zijn belangenafweging moeten laten zien. Ook bij (beperkingen van) publicaties die noch bijdragen aan het maatschappelijk debat noch de kern van de privacy raken, dient de rechter een dubbele toets toe te passen. Het ziet er naar uit dat het EHRM gekozen heeft voor de tweede situatie die Nieuwenhuis voor ogen staat, zonder dat het Hof

expliciteert dat het uit meerdere mogelijkheden kon kiezen of waarom het niet voor een dubbele noodzakelijkheidstoets heeft gekozen. Toch hangt een dergelijke keuze nauw samen met de vraag wat men onder maatschappelijk debat verstaat en wat onder een inbreuk op het privéleven. Zoals uit de concurring opinions blijkt valt zeer goed te verdedigen, dat in de onderhavige zaak eerder Nieuwenhuis' derde situatie aanwezig was. Dat de bijdrage aan het maatschappelijk debat een zwaarwegende omstandigheid is, moet echter worden onderschreven. In mijn 'Mediarechtelijk in memoriam' stelde ik dat de rechter niet eerst de juistheid van bepaalde mededelingen over iemands privéleven zou moeten beoordelen, maar eerst zou moeten nagaan of de mededelingen, indien waar, maatschappelijk relevant – gerechtvaardigd door een publiek belang – waren (*Mediaforum* 2002-11/12, p. 347), overigens zonder de slotvraag en check vanuit oogpunt van vrijheid van meningsuiting uit het oog te verliezen. Maar men kan het niet omkeren. Als de bijdrage aan het publieke debat ontbreekt wil dat niet zeggen dat de publicatie niet beschermd is door artikel 10 EVRM. Ook dán moet men nagaan of en in hoeverre inbreuk gemaakt wordt op iemands persoonlijke levenssfeer. Bij tamelijk onschuldige foto's moet dan m.i. voorrang gegeven worden aan de persvrijheid (en de behoefte van het publiek om geïnformeerd te worden) Zie daarover ook mijn *Inzoomen op de Eikenhorst. Over maken en openbaar maken*, Den Haag: Boom Juridische Uitgevers 2004, p. 10-14. Iets anders is, dat een 'continual harassment' of een journalistiek stalken, ook al gaat het om betrekkelijk onschuldige foto's, een ernstige inbreuk vormt op de persoonlijke levenssfeer. In de Duitse zaken werd echter geen stalk- of postverbod gevraagd, maar een publicatieverbod van de foto's. Het Hof laat de wijze waarop sommige foto's tot stand kwamen wel zwaar mee wegen alsmede het grote aantal publicaties met foto's van klaagster, waarmee het dus eigenlijk dat lastig vallen veroordeelt. Alles duidt erop dat het een waarschuwende vinger willen opheffen tegen (de publicaties en wijze van nieuwsgaren van) 'certain media'.

Zoals de Hof de grenzen thans getrokken heeft lijkt er nauwelijks nog plaats voor een belangenafweging. Het lijkt haast op de situatie in Nederland na het Vondelparkarrest, toen men zich ook afvroeg of er nog wel ruimte was voor een belangenafweging nu de Hoge Raad elke inbreuk op de privacy als een redelijk belang in de zin van artikel 21 Auteurswet had bestempeld. Later heeft de Hoge Raad die vrees weggenomen door uit te leggen dat het Vondelparkarrest wel degelijk ruimte laat voor belangenafweging. De Hoge Raad had daar immers gezegd: er is *in beginsel* een redelijk belang als de privacy is aangetast. Voor diegenen die thans vrezen dat het EHRM een belangenafweging uitsluit (en dus de persvrijheid op een lager plan heeft gezet), moet opgemerkt worden dat het ook volgens het Hof nog steeds gaat om een 'fair balance between competing interests' en dat het Hof nog steeds refereert aan de uitgangspunten van zijn rechtspraak over de in artikel 10 beschermde vrijheid van meningsuiting. Daar moeten we dan maar op vertrouwen. Maar ik had liever wat meer overwegingen als die van rechter Barreto in het arrest aangetroffen. Het uitgangspunt uit oogpunt van vrijheid van meningsuiting en informatie moet immers zijn dat de burger bepaalt wat hij wil weten en de media bepalen wat zij publiceren. De rechter moet slechts nagaan of er noodzaak is daaraan beperkingen te stellen. Dat lees ik wel bij Barrreto, maar niet in het arrest.

Nr 28 KPN Telecom vs. OPTA en Tiscali

College van Beroep voor het Bedrijfsleven 16 april 2004
Zaaknr: AWB 03/1365 en 03/1401

Uitspraak inzake de hoger beroepen van:

1. Tiscali B.V (Tiscali), gevestigd te Utrecht (nr. AWB 03/1365), gemachtigde: mr. G. J. Zwenne, advocaat te 's-Gravenhage;
2. de Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA) (nr. AWB 03/1401), te 's-Gravenhage, gemachtigde: mr. E.J. Daalder, advocaat te 's-Gravenhage,

tegen de uitspraak van de voorzieningenrechter van de rechtbank Rotterdam van 30 oktober 2003 in het geding tussen KPN Telecom B.V. (KPN), gevestigd te 's-Gravenhage, en OPTA, met als derde partij: Tiscali.

Gemachtigden van KPN: mr. J. Erwteman en mr. Q.R. Kroes, advocaten te Amsterdam.

[...]

7. De toepasselijke regelgeving

Deel 1 van Bijlage I bij Richtlijn 97/33/EG van het Europees Parlement en de Raad van 30 juni 1997 inzake interconnectie op telecommunicatiegebied (...) (interconnectie-richtlijn) bepaalt het volgende:

'Het vaste openbare telefoonnetwerk

Het vaste openbare telefoonnetwerk is het openbare geschakelde telecommunicatienetwerk voor de overdracht tussen netwerkaansluitpunten op vaste locaties van spraak en van audio-informatie met een bandbreedte van 3,1 kHz, o.a. voor:

– spraaktelefonie;
– groep iii-faxcommunicatie, in overeenstemming met de ITU-T-aanbevelingen van de T-reeks;
– spraakbanddatatransmissie via modems met een snelheid van ten minste 2 400 bit/s, in overeenstemming met de ITU-T-aanbevelingen van de V-serie.

De toegang tot het netwerkaansluitpunt van de eindgebruiker vindt plaats via een nummer of een aantal nummers in het nationaal nummerplan.

Richtlijn 98/10/EG van het Europees Parlement en de Raad van 26 februari 1998 inzake de toepassing van Open Network Provision (ONP) op spraaktelefonie en inzake de universele telecommunicatiedienst in een door concurrentie gekenmerkt klimaat (spraaktelefonierichtlijn) bevat onder meer de volgende bepalingen:

Artikel 2 Definities

[...]

3. Voor deze richtlijn geldt het volgende:

a) de begrippen 'vast openbaar telefoonnetwerk' en 'mobiel openbaar telefoonnetwerk' staan omschreven in bijlage I van Richtlijn 97/33/EG inzake interconnectie.

[...]

Artikel 16 Bijzondere netwerktoegang

1. De nationale regelgevende instanties zorgen ervoor dat de organisaties met een aanmerkelijke macht op de markt voor het aanbieden van telefoondiensten over vaste openbare telefoonnetwerken redelijke verzoeken van organisaties die telecommunicatiediensten aanbieden, om toegang tot het vaste openbare telefoonnet op andere netwerkaansluitpunten dan de in bijlage ii, deel 1, genoemde aansluitpunten, in behandeling nemen. Deze verplichting mag alleen worden beperkt van geval tot geval en als er technische en economisch levensvatbare alternatieven voor de gevraagde bijzondere toegang voorhanden zijn en wanneer de gevraagde toegang niet in een redelijke verhouding staat tot de beschikbare middelen om aan het verzoek te voldoen.
[...]